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D.B., Appellant)	
)	
and)	Docket No. 06-1871
)	Issued: March 6, 2007
U.S. POSTAL SERVICE, POST OFFICE,)	
Plaquemine, LA, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

On August 9, 2006 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 2, 2006 and a nonmerit decision dated July 13, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues of this case.

The issues are: (1) whether appellant has established that his accepted back condition resulted in impairment of his lower extremities or other scheduled members; and (2) whether the Office properly declined to reopen appellant's claim for consideration of the merits in accordance with section 8128(a) of the Federal Employees' Compensation Act.¹

¹ 5 U.S.C. §§ 8101-8193, § 8128(a).

FACTUAL HISTORY

This case has been before the Board on appeal on two previous occasions. On September 13, 1995 appellant, then a 53-year-old mail carrier, filed a traumatic injury claim alleging that he injured his left leg, thigh, groin and back when his foot went through a porch floor while he was in the performance of his federal job duties. The Office accepted appellant's claim for displaced lumbar disc and authorized compensation benefits. Appellant alleged that following his return to light-duty work he sustained a recurrence of total disability on March 28, 2002. The Office denied this claim on September 5, 2002. In its April 18, 2003 decision,² the Board affirmed the Office's September 5, 2002 decision concluding that appellant had not met his burden of proof in establishing a recurrence of total disability on or after March 28, 2002.

Appellant requested a schedule award on February 7, 2003. The Office denied this claim on July 15, 2003 finding that appellant had not established that his accepted back injury resulted in any impairment of a scheduled member. Appellant requested an oral hearing which the Branch of Hearings and Review denied as untimely on November 10, 2003. The Board issued its decision on July 12, 2004³ and affirmed the Office's decisions. The Board found the evidence from appellant's attending physician Dr. Gregory Ward, Board-certified in physical medicine and rehabilitation, dated through December 4, 2002 was not sufficiently detailed and specific to establish that appellant had any left lower extremity impairment due to his accepted lumbar spine injury. The Board further found that appellant was not entitled to an oral hearing. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Dr. Ward submitted a report dated April 15, 2004 and diagnosed chronic low back pain with bilateral lower extremity radiculopathy. He submitted an additional report dated May 26, 2004, noting his impression of degenerative disc disease throughout the lumbar spine without focal herniation or protrusion. Dr. Ward noted that appellant described an increase in symptoms resulting in intense low back pain with burning and lumbar radicular symptoms to his legs, hip, thighs and feet. On July 8, 2004 he repeated his diagnoses and again found that appellant's symptoms had increased.

The Office provided a letter authorizing a comprehensive evaluation pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (A.M.A., *Guides*) on September 27, 2004. The Office noted that this examination was to be in regard to the lower extremities and that the accepted condition was displacement of lumbar intervertebral disc without myelopathy. In a report dated October 13, 2004, Dr. John E. Clark, a Board-certified physical medical and rehabilitation specialist, noted that he was examining appellant for schedule award purposes. He noted appellant's history of injury and medical treatment.

² Docket No. 03-305 (issued April 18, 2003).

³ Docket No. 04-481 (issued July 12, 2004).

⁴ A.M.A., *Guides* (5th ed. 2000).

Dr. Clark found that appellant had limited range of motion in his lumbar spine and pain in his left hip. He diagnosed chronic pain syndrome with significant psychological overlay as well as lumbar degenerative disc disease. Dr. Clark stated:

“Based on the review of the review of the medical records provided by the patient and the clinical exam[ination] I would award [appellant] the following impairment rating based on the [A.M.A., *Guides*]: 5 [to] 8 percent impairment of the whole person, permanent partial. His symptoms and tests place him in a DRE [diagnosis-related estimate] lumbar category 2 in accordance with Table 15.3, [p]age 384, in the [A.M.A., *Guides*].”

Dr. Ward completed a report on February 3, 2005 and noted Dr. Clark’s findings.

Appellant requested a schedule award on October 11, 2005. The Office medical adviser reviewed the medical evidence of record on February 24, 2006 and noted that DRE lumbar category 2 of the A.M.A., *Guides*, selected by Dr. Clark, did not require verifiable radicular pathology. He concluded that appellant did not have any ratable right or left lower extremity impairment.

By decision dated March 2, 2006, the Office denied appellant’s claim for a schedule award finding that the medical evidence did not establish a permanent impairment to a scheduled member due to his accepted employment injury.

Appellant requested reconsideration of the Office’s March 2, 2006 decision on June 6, 2006. In support of his reconsideration request, appellant submitted extensive medical evidence regarding his various nonemployment-related conditions. Dr. Ward completed a report on June 8, 2006 and included appellant’s reported symptoms on low back pain, burning pain to his feet, the feeling as if a mosquito is biting his legs and increased pelvic pain. He noted that appellant wanted to know if his falls could be related to his back injury and leg weakness.

Appellant also submitted a letter dated June 4, 2006, requesting that Dr. Darryl W. Peterson, a Board-certified orthopedic surgeon, perform his next schedule award evaluation. In a letter dated January 25, 2005, Ron Watson, a union official, informed appellant of the defect in Dr. Clark’s October 18, 2004 report. On March 29, 2006 Mr. Watson provided appellant with the requirements for a schedule award due to his spine condition.

By decision dated July 13, 2006, the Office listed the evidence submitted and found that it was not relevant to appellant’s claim for a schedule award. The Office declined to reopen appellant’s claim for consideration of the merits.⁵

⁵ Following the Office’s July 13, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁶ and its implementing regulation⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁸ Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁹

No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations.¹⁰ A schedule award is not payable for an impairment of the whole person.¹¹ The spine is not included among the list members for which a schedule award is payable.¹²

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹³

ANALYSIS -- ISSUE 1

Dr. Clark, Board-certified in physical medicine and rehabilitation, reported that appellant had a whole person impairment of five to eight percent. He based this impairment rating on DRE of the lumbar spine category 2.¹⁴ As noted by the Office medical adviser, this category

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

¹⁰ *Brent A. Barnes*, 56 ECAB ____ (Docket No. 04-1025, issued February 15, 2005).

¹¹ *Id.*

¹² *Guiseppe Aversa*, 55 ECAB 164, 167 (2003).

¹³ *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

¹⁴ *Supra* note 4 at 384, Table 15-3.

includes nonverifiable radicular complaints or complaints of radicular pain without objective findings. As noted above, appellant is not entitled to a schedule award for impairment to his spine alone nor is he entitled to a schedule award based on impairment to the whole person.

Dr. Clark's report did not provide sufficient detail regarding any impairment to appellant's lower extremities such that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations. His report is, therefore, not sufficient to establish that appellant has any impairment to his lower extremities based on his accepted lumbar spine injury. Furthermore, by placing appellant in a spinal rating category which indicates that there were no objective findings supporting his claims of radicular symptoms, Dr. Clark had indicated that appellant may not have the appropriate findings to support his claim for a schedule award to his lower extremities. For these reasons, Dr. Clark's report is not sufficient to meet appellant's burden of proof and does not support his claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁵ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁷

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's March 2, 2006 decision denying his claim for a schedule award on June 6, 2006. In support of this request appellant submitted additional new medical evidence. However, this evidence was not sufficient to require the Office to reopen appellant's claim for consideration of the merits as the evidence did not address the relevant issue of whether appellant has any permanent impairment of a scheduled member as a result of his accepted employment injury. The reports submitted addressed various nonemployment-related conditions and did not provide any permanent impairment rating in accordance with the A.M.A., *Guides*.

Appellant submitted a report from Dr. Ward dated June 8, 2006, which mentioned appellant's back pain and leg symptoms. However, Dr. Ward did address whether these findings were permanent impairments and this report is not relevant to appellant's claim for a schedule

¹⁵ See *supra* note 1.

¹⁶ *Supra* note 7 at § 10.606(b)(2).

¹⁷ *Id.* at § 10.608(b).

award. Appellant also failed to submit any relevant legal argument in support of his claim. For these reasons, the Office properly declined to reopen his claim for consideration of the merits on July 13, 2006.

CONCLUSION

The Board finds that appellant failed to submit the necessary medical evidence to establish that he sustained permanent impairment of a scheduled member as a result of his accepted back injury and that, therefore, the Office properly denied his claim for a schedule award. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on July 13, 2006.

ORDER

IT IS HEREBY ORDERED THAT the July 13 and March 2, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board